

KENYON DISEND, PLLC

THE MUNICIPAL LAW FIRM

MICHAEL R. KENYON
BRUCE L. DISEND
SHELLEY M. KERSLAKE

SANDRA S. MEADOWCROFT
CHRIS D. BACHA
BOB C. STERBANK

11 FRONT STREET SOUTH
ISSAQUAH, WASHINGTON 98027-3820
WWW.KENYONDISEND.COM
(425) 392-7090 • (206) 628-9059
FAX (425) 392-7071

MARGARET J. KING
KARI L. SAND
NOEL R. TREAT
STEVE I. VICTOR
RENÉE G. WALLS
SARA B. SPRINGER

July 6, 2009

Rachel McCrea
Municipal Stormwater Specialist
Water Quality Program
Department of Ecology
Northwest Regional Office
3190 160th Avenue SE
Bellevue, WA 98008-5452

Robert Wright
Water Quality Specialist
Water Quality Program
Department of Ecology
Northwest Regional Office
3190 160th Avenue SE
Bellevue, WA 98008-5452

VIA E-MAIL AND U.S. MAIL

Re: Department of Ecology - Notice of Violation No. 6180

Dear Ms. McCrea and Mr. Wright:

On November 13, 2008, the Department of Ecology (DOE) sent a letter enclosing a Notice of Violation to King County and the City of Tukwila. The County and the City formally responded to the NOV in a letter dated December 12, 2008. On May 12, 2009, the City met with both of you to further discuss the NOV and the City's response. At that meeting, Mr. Wright stated that he believed that the County had made a compelling argument that it had no jurisdiction or control over the pipe because it was outside of the County's jurisdiction and located on private property. He asked that the City clarify the City's position with respect to the 24-inch drainage pipe that runs along the northern edge of the Jorgensen Forge property between East Marginal Way and the Duwamish River (the subject of the NOV).

Specifically, DOE asked the City to respond to two questions: 1) Whether the fact that the City discharges stormwater into the pipe makes the City responsible for the pipe; and 2)

G:\APPS\CIVTUKWILA\Jorgensen Pipe DOE NOVLTR - NOV Response 07.06.09.doc\SAL\07/06/09

Whether Chapter 14.30 of the Tukwila Municipal Code grants or requires the City to take enforcement action against Jorgensen Forge.

1. Discharge of Stormwater into the Pipe.

As the City has previously pointed out, it does not own either the pipe or the property on which it is located. The City does not have an easement for discharge into the pipe. Accordingly, under real property law, the City does not have liability or, in common parlance, responsibility, for the pipe that is located on private property.

Under Washington law, the City has a right to continue to discharge water into a "natural watercourse or natural drain," and may increase the volume and velocity of the flow within it, so long as in doing so it does not exceed its capacity. The terms "natural watercourse," "natural drain," and "natural drainway" include piped drainages that formerly constituted natural drains. The fact that the City has a legal right to discharge to a watercourse or natural drain, however, does not confer liability or responsibility over that watercourse (even if piped), just the right to continue to discharge water. Here, the pipe in question was formerly part of a natural drainage way. The pipe was installed and the rest of the area filled to permit Jorgensen to utilize the area for parking or other uses. In so doing, Jorgensen assumed the responsibility to maintain and repair the pipe to accommodate times of ordinary high water. See *Wilber v. Western Properties*, 14 Wn. App. 169, 173 (1975) (an owner must provide for adequate drainage to accommodate during times of ordinary high water where there is a natural drainage area.); *Island County v. Mackie*, 36 Wn. App. 385, 390-91 (1984) (landowner may not block a natural watercourse or natural drainway). The City does not acquire any liability for the natural drainway (even though it is now piped), simply by virtue of discharging water into it, as is the City's right under common law. As the owner of the pipe as well as the property where water flowed as part of a natural drainway, it is Jorgensen (and not the City) who is liable for the condition of the pipe and, by analogy, any hazardous waste contained within it.

2. Whether Chapter 14.30 of the Tukwila Municipal Code grants or requires the City to take enforcement action against Jorgensen Forge.

- a. TMC 14.30 authorizes the City to take enforcement action only in the event of an activity or "discharge," which is not presently occurring.

The City's Storm Water Management Code is codified at Chapter 14.30 of the Tukwila Municipal Code. Section 14.30.010.A provides the City's Public Works authority includes "enforcement and implementation of measures necessary to carry out the intent of TMC Chapter 14.30." Section 14.30.010.B and .C go on to provide that the Director's enforcement authority may be directed at "acts or intended acts" of a person, and specifically, when "the Director determines that a person engaged in an activity that could or does negatively affect surface water

Rachel McCrea
Robert Wright
July 6, 2009
Page 3

has failed to comply with City code. . . .” TMC 14.30.060.B further limits the types of activity subject to enforcement as “discharges,” and authorizes the Director to prohibit those that are not listed in TMC 14.30.060.A, including specifically “chemicals, petroleum products, paints, solvents, detergents, and degreasers, and other toxic or deleterious materials.” A “discharge,” particularly an “illicit discharge,” is defined as a “non-surface water discharge to the storm water conveyance system.” Thus, while TMC 14.30.090 authorizes the Director to inspect and monitor privately-owned drainage facilities, and to give notice of any violations and require corrective action, the Director’s authority to do so is triggered only when the Director determines that a violation of Chapter 14.30 is present or operating on the property, *i.e.*, that a person is engaged in an action or activity – namely, an illicit discharge to the “storm water conveyance system” – that violates the standards set forth in Chapter 14.30.

In the case of the Jorgensen pipe, there is no indication that the Jorgesens are engaged in any activity, let alone an “illicit discharge” to the storm water conveyance system. Rather, the contamination about which Ecology is concerned resulted from discharges by Jorgensen that occurred years ago. Indeed, there is not even any proof that anything is coming out of the pipe; there are some indications that the contamination is present in the soil, due to pipe deterioration and break-up, and is being washed back into the pipe and into Puget Sound by tidal flushing. Because the Director cannot determine that a person is engaged in an activity, namely, an illicit discharge to the storm water conveyance system, the City has no authority under TMC Chapter 14.30 to initiate an enforcement action.

The problem in this circumstance is that Ecology appears to be equating a “discharge” to surface or ground water with a “release” of hazardous waste governed by CERCLA and MTCA. As contemplated by TMC Chapter 14.30, a “discharge” is an activity engaged in by a person, that actively and illicitly conveys a non-surface water substance to the storm water conveyance system. When the Director determines that such an activity is ongoing, the Director is authorized to give notice to the violator, and direct corrective action to ensure that the discharge ceases. A “release” of hazardous substances, by contrast, occurs passively, often unintentionally, as the result of a discharge, dumping or abandonment that occurred years before, often by persons or corporations who can no longer be located, and often in compliance with standards and practices at the time. *Compare* TMC 14.30.010.B and .C *with* RCW 70.105.D.020(25) (“‘Release’ means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.”). The circumstances present regarding the Jorgensen Forge property deal with a “release” of hazardous substances, not a “discharge” activity by a person that the Tukwila Public Works Director could order halted under TMC 14.30. Indeed, the contamination is the subject itself of a separate CERCLA / MTCA proceeding and Ecology enforcement action. While Ecology might desire that Tukwila’s code provided broader coverage, as TMC 14.30.050.A and .C explain, however, TMC 14.30 provides only minimum requirements, and may not necessarily mitigate all impacts to human health and the environment. There is a legally

Rachel McCrea
Robert Wright
July 6, 2009
Page 4

appropriate mechanism by which cleanup may be pursued, but enforcement under TMC Chapter 14.30 is not it.

- b. Even if TMC Chapter 14.30 authorized an enforcement action, such an action is discretionary, not mandatory.

Even if TMC Chapter 14.30 authorized an enforcement action here, such an action is discretionary, not mandatory. TMC 14.30.020.B and .C indicate that, if the Director determines that certain prerequisites are met, the Director "may" initiate an enforcement action. Likewise, TMC 14.30.060.B states that "the Director may prohibit" discharges that are not permitted under .060.A. Similarly, with respect to maintenance of storm water facilities on private property, TMC Section 14.30.090 provides that the Director "may" issue a notice of violation and "may" take corrective action if the property owner does not do so. Use of the word "may" indicates that the actions described are discretionary, not mandatory. It is well established under Washington law that the City cannot be compelled to take actions that are within its enforcement discretion. *See, e.g., Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310, 319-321 (2009) (writ of mandamus available only to compel performance of ministerial and not discretionary duty); *Brain v. Doe*, 131 Wn. App. 1004, 2006 WL 14542 (Div. II 2006) (mandamus not available to compel County to remove illegal encroachments from the public right-of-way); *Tucker v. Kittitas County*, 89 Wn. App. 1069, 1988 WL 138700 (Div. II 1988) (County could not be compelled to enforce building and zoning codes); *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 242 P. 966 (1926) (city could not be compelled to reconstruct burned bridge).

Given the foregoing, there is no legal basis for Ecology's enforcement action against the City of Tukwila. Tukwila is not discharging any pollutant, nor causing the discharge of any pollutant – the pollutants were discharged years ago, and remain in the soil around the pipe. Tukwila cannot be forced to exercise its discretionary code enforcement authority to address contamination that is the fault of other entities – especially given that Ecology has its own enforcement / cleanup proceedings already pending against such parties, and where Ecology has additional enforcement authority of its own, under RCW 90.48, that it for some reason has chosen not to exercise.

Very truly yours,

KENYON DISEND, PLLC



Margaret J. King

cc: Jim Morrow, Public Works Director
Ryan Larson, Senior Engineer